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The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions Only For The Rich?

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THE EFFECT OF RECENT MEDICAID DECISIONS ON A CONSTITUTIONAL RIGHT: ABORTIONS ONLY FOR THE RICH?

I. Introduction

In three concurrent but separate class action suits,[1] the United States Supreme Court decided that a state's refusal to pay expenses incident to nontherapeutic abortions neither contravened Title XIX of the Social Security Act,[2] nor contravened equal protection of the laws.[3] In each of the three suits indigent women sought injunctive

1. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

2. 42 U.S.C. §§ 1396-97(f) (1970 and Supp. V 1975). Title XIX establishes a Medical Assistance program (commonly known as Medicaid) which enables participating states to provide federally funded medical assistance to eligible persons. The federal Medicaid program creates two groups of needy persons: (1) the "categorically needy," which includes recipients of federal welfare programs for dependent children (42 U.S.C. §§ 601-02 (Supp. V 1975)), the aged, blind, and disabled (42 U.S.C. § 1396a(a)(10)(A)) and (2) the "medically needy," which includes people who have too many resources to qualify for welfare, but who have dependent children or are aged, blind or disabled within the meaning of the welfare laws. (*Id.* § 1396a(a)(10)(C)). Participating states are not required to extend Medicaid coverage to the medically needy. Pennsylvania and Connecticut are among the states that have chosen to do so. 3 Pennsylvania Bulletin 2207 (Sept. 29, 1973); *see also* 432 U.S. at 440 n.1; Connecticut Welfare Department Public Assistance Program Manual, Vol. 3, c. III, § 275 (1975); 432 U.S. at 465-66.

The Medicaid statute requires participating states to provide qualified individuals with financial assistance in five general categories of medical treatment: 42 U.S.C. §§ 1396a(a)(13)(B), 1396d(a)(1)-(5).

> (1) inpatient hospital services . . . ;
> (2) outpatient hospital services;
> (3) other laboratory and x-ray services;
> (4) (A) skilled nursing facility services . . . for individuals twenty-one years of age or older
> (B) . . . early and periodic screening and diagnosis . . . and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby,
> and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered to be sexually active) who are eligible under the state plan and who desire such services and supplies;
> (5) physicians' services furnished by a physician . . . whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere.

See 432 U.S. at 440 n.2.

3. U.S. CONST. amend. XIV, § 1 provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny *to any person within its jurisdiction the equal protection of the laws.*" (emphasis added).

and declaratory relief from statutes and regulations denying them Medicaid subsidy for their desired elective abortions.[4] Each plaintiff clearly met all the financial requirements for Medicaid assistance.[5] However, regulations in each of the states afforded financial assistance only to indigent mothers whose abortions were certified as "medically necessary" by a panel of physicians.[6] Since these same states provided financial assistance to indigent mothers for medical expenses incident to pregnancy and childbirth,[7] plaintiffs alleged the abortion certification requirements contravened Title XIX and the fourteenth amendment.

In *Beal v. Doe,* the Court held that the Social Security Act does not require the states to provide Medicaid funds for nontherapeutic abortions.[8] In *Maher v. Roe,* the Court further specified that the equal protection clause does not require a state participating in the Medicaid program to subsidize the expenses of nontherapeutic abortions even though it pays for the medical expenses relating to childbirth.[9] Finally, in *Poelker v. Doe,* the Court found that the equal protection clause does not compel municipal hospitals to make their facilities available for elective abortions even though they are made available for childbirth.[10]

This Note will trace the development of abortion decisions since *Roe v. Wade*[11] and *Doe v. Bolton,*[12] and discuss the issues left unanswered by those landmark decisions, namely, must public hospitals now permit the use of their facilities for abortions, and are states obligated to pay for abortions for women who cannot afford them?

4. Beal v. Doe, 432 U.S. at 441; Maher v. Roe, 432 U.S. at 467; Poelker v. Doe, 432 U.S. at 519.

5. Beal v. Doe, 432 U.S. at 441; Maher v. Roe, 432 U.S. at 467; Poelker v. Doe, 432 U.S. at 519-20. *See also* Doe v. Poelker, 515 F.2d 541, 542 (8th Cir. 1975) and the federal requirement in note 16 *infra.*

6. Beal v. Doe, 432 U.S. at 441; Maher v. Roe, 432 U.S. at 466; Doe v. Poelker, 515 F.2d at 543.

7. 432 U.S. at 441-42, 466, 520-21.

8. 432 U.S. at 447.

9. 432 U.S. at 465-66.

10. 432 U.S. at 521.

11. 410 U.S. 113 (1973).

12. 410 U.S. 179 (1973).

II. Background

A. Medicaid Legislation

Congress enacted Title XIX of the Social Security Act—commonly referred to as Medicaid—in 1965.[13] The Medicaid program is a state-administered plan designed to pay the costs of medical care for most welfare recipients and certain other poor individuals.[14] The program is funded by the federal and state governments.[15] States are not required to participate in Medicaid, but if they choose to do so, they must comply with the federal statutes and regulations which govern the program.[16]

Arguably, federal payment for nontherapeutic abortions might be required under the Medicaid benefits allotted for physicians' services, inpatient or outpatient services.[17] Generally, however, plaintiffs in the cases discussed herein sought Medicaid subsidy for abortion under the physicians' services provision.[18]

In 1972, the Medicaid statute was amended to include family planning services,[19] but the amendment did not specifically mention abortion.[20] Since abortion was not expressly excluded, the court of

13. Act of July 30, 1965, Pub. L. No. 89-87, tit. I, § 121(a). 79 Stat. 343 (codified at 42 U.S.C. §§ 1396-1396(d) (1970), *as amended* by 42 U.S.C. §§ 1396-1396(d) (Supp. V 1975)).

14. For an overview of the Medicaid program, see Butler, *The Medicaid Program: Current Statutory Requirements and Judicial Interpretations*, 8 Clearinghouse Rev. 7 (1974).

15. The federal government provides between 50% and 83% of the funds, depending on state income. 42 U.S.C. § 1396(d) (Supp. V 1975).

16. *See* note 2 *supra*. The preamble to Title XIX requires states to assume the costs of medical assistance for those whose "income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396. States wishing to restrict Medicaid payments claim that abortions not necessary to protect life or health fail to meet this standard.

Although the Social Security law requires states to subsidize medical costs to the categorically needy, a majority of states participating in the Medicaid program have opted to further subsidize the medically needy. It is clear that any service offered to the medically needy must also be offered to the categorically needy. This is the so-called "comparability requirement." *Id.* § 1396a(a)(10)(B) (Supp. V 1975). Therefore, arguably, if the state chooses to finance abortions for medically needy women, by law it must also subsidize abortion costs for categorically needy women.

17. *See* note 2 *supra*.

18. *See* 42 U.S.C. § 1396d(a)(1),(2) and 42 U.S.C. § 1396d(a)(4) (Supp. V 1975). The federal statute stipulates that such treatment shall be covered "whether furnished in the office, the patient's home, a hospital or a skilled nursing facility, or elsewhere." *Id.* § 1396d(a)(5). The services of a physician performing an abortion if licensed by the state would appear to fall squarely within the bounds of medicaid coverage.

19. Act of Oct. 30, 1972, Pub. L. No. 92-603, § 299E, 86 Stat. 1462, *amending* 42 U.S.C. § 1396d(a) (1970) (codified at 42 U.S.C. § 1396d(a)(4)(C) (Supp. V 1975)).

20. *See* S. REP. No. 92-1230, 92d Cong., 2d Sess. 297 (1972).

appeals in *Beal* inferred that when Congress extended Medicaid coverage for family planning, it intended such services to be included.[21]

While the *Beal, Maher* and *Poelker* cases were pending before the Supreme Court, Congress further complicated resolution of the public funding issue by enacting, over presidential veto, the Hyde Amendment to the appropriations bill funding the Department of Health, Education and Welfare (HEW) and the Department of Labor for the fiscal year 1977.[22] This appropriations "rider" limits federal payments for abortion to cases "where the life of the mother would be endangered if the fetus were carried to term."[23]

B. Abortion: A Qualified Constitutional Right

In the landmark decisions of *Roe v. Wade*[24] and *Doe v. Bolton,*[25] the Supreme Court first held that women have a constitutional right to decide whether to have an abortion. However the right to an abortion is a qualified right counterbalanced by the state's legitimate interests in maternal health and the potentiality of human life in the latter two trimesters of the mother's pregnancy.[26]

In *Roe v. Wade,* petitioner challenged Texas statutes making it a crime to perform an abortion unless it was necessary to save the mother's life.[27] The Supreme Court held that the right to an abortion was encompassed within the fourteenth amendment's concept of personal liberty.[28] Moreover, the Court found that right to be

21. Doe v. Beal, 523 F.2d 611, 622-23 (3rd Cir. 1975). The court drew its inference in light of congressional treatment of abortion in other laws prior to adoption of the Hyde amendment. *See* 42 U.S.C. § 300a-6 (1970) and 42 U.S.C. § 299f(b)(8) (Supp. V 1975) where Congress specifically excluded abortion from family planning services when it enacted this legislation.

One might argue that abortion is not a family planning service, since it is remedial rather than preventive and thus not the best method for regular family planning.

22. Act of Sept. 30, 1976, Pub. L. No. 94-439, 90 Stat. 1418. *See* 122 CONG. REC. S17,304, H11,860 (daily ed. Sept. 30, 1976).

23. Act of Sept. 30, 1976, Pub. L. No. 94-439 § 209, 90 Stat. 1434. The use of the "rider" is arguably an inappropriate vehicle for substantive policy legislation because it runs counter to Congress' own procedural rules and does not afford committees the opportunity to investigate and analyze the amendment's impact. *See* 122 CONG. REC. H8632 (daily ed. Aug. 10, 1976) (remarks of Rep. Abzug). The act terminated on September 30, 1976 but was renewed for one more year in a similar appropriation rider. *See* note 61 *infra.*

24. 410 U.S. 113 (1973).

25. 410 U.S. 179 (1973).

26. *See* notes 30-33 and accompanying text *infra.*

27. TEX. PENAL CODE ANN. arts. 1191-94 & 1196.

28. 410 U.S. at 153.

"fundamental," thus requiring the state to prove a "compelling state interest"[29] to regulate the right during the first trimester of pregnancy.[30] *Wade* held that the abortion decision during this period should be left solely to the woman and her attending physician.[31] However, during the second trimester the state's interest in the woman's health predominates over her freedom of choice allowing it to regulate the abortion decision.[32] During the third trimester, the state's interest in regulation reaches a "compelling point" at which time the state may impose even more stringent medical precautions for the health of the mother and may even protect the potentiality of human life itself.[33]

In the companion case of *Doe v. Bolton,* the Court used its precedent in *Wade* to invalidate a Georgia law regulating abortions.[34] Doe,

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29. See B. SCHWARTZ, CONSTITUTIONAL LAW (1972) for detailed discussion of the compelling state interest test versus the rational basis test:

> To be consistent with equal protection [fourteenth amendment], a classification must rest upon some difference that bears a reasonable relation to the act in respect to which the classification is proposed . . . . [A] classification, by its nature, sets off a group affected by special burdens or benefits that do not apply to 'all persons.' The very idea of classification is that of inequality . . . .
>
> There are two types of case [sic] where the mere showing that it is rationally related to legitimate governmental objective is not enough to sustain a challenged classification. The first is the case where the classification impinges on a fundamental constitutional right, such as the right to travel interstate."

Id. at 288-91 (footnotes omitted).

The second is the case where the classification impinges on a suspect class such as race. This type of classification is inherently unreasonable no matter how reasonably it may seem to be related to a proper public purpose. In both of these cases, the classifications will be held to deny equal protection unless justified by a compelling governmental interest. This is a stricter standard to meet than the rational basis standard. *Id.*

30. 410 U.S. at 162. In fact, the Supreme Court said that a state never has a compelling interest during the first trimester to regulate a mother's abortion decision.

31. *Id.* at 163-64.

32. *Id.* at 164-66. The Court said that although the state cannot override that right, it has a legitimate interest in protecting both the pregnant woman's health and the potentiality of human life. Each of these interests grows and reaches a "compelling" point at various stages of the woman's approach to term.

33. *Id.* The *Wade* Court expressed a concern for the high mortality rate at illegal "abortion mills." Mr. Justice Blackmun, writing the Court's opinion, stated that the state's original interest is in protecting the woman's health rather than preserving the embryo. *Id.* at 150. The Court added that during the last trimester, a state may actually proscribe abortion except when necessary for the preservation of the life or health of the mother. *Id.* at 163-64.

34. GA. CODE § 26-1202 (1975), formulated by 1968 Ga. Laws 1249, 1277-1280. The Georgia law prohibited abortions except as performed by a duly licensed Georgia physician who determined that continued pregnancy would injure the woman's life, the fetus would likely be born with a serious defect, or the pregnancy resulted from rape. The law also required that the patient be a resident of the state and that the abortion meet the following

an indigent pregnant woman, was denied an abortion because, *inter alia,* she failed to meet Georgia's requirement that her attending physician and a reviewing panel of physicians certify that her continued pregnancy would injure her life.[35]

The Supreme Court held that Georgia statute unconstitutional as violative of the fourteenth amendment.[36] According to the Court, the review committee's procedure of certifying abortions before they could be obtained did not advance legitimate state interests in maternal health. Furthermore, the same requirements were not imposed on patients requesting similar surgical and medical procedures.[37] Therefore, the committee unduly restricted a fundamental right without first establishing a compelling state interest.[38]

III. Medicaid Coverage for Nontherapeutic Abortion: *Beal v. Doe*

Having judicially created a new right of abortion in the *Wade* and *Bolton* decisions,[39] the Supreme Court was presented with a host of issues attendant to the new right.[40] One of those issues was whether

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procedural conditions: (1) the abortion was to be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (J.A.C.H.); (2) the procedure must have been approved by the hospital staff's abortion committee; and (3) two other licensed physicians had to confirm the performing physician's judgment.

35. 410 U.S. at 185. *See* GA. CODE § 26-1202(a) (1975). Doe attacked both the provision requiring a reviewing committee and the statute limiting the hospitals in which abortions could be performed to those accredited by the Joint Commission on Accreditation of Hospitals (JACH). The latter requirement prevented her from obtaining an abortion in a local clinic. 410 U.S. at 185-86.

36. *Id.* at 199.

37. *Id.* at 198-99.

38. *Id.* The *Bolton* Court sidestepped petitioner's last argument challenging the statute's discrimination against the poor. The Court held that by striking down Georgia's accreditation, approval and confirmation requirements, the equal protection argument did not have to be decided. *Id.* at 200-01. In so holding, the Court left the discrimination issue open, to be confronted four years later in Maher v. Roe, 432 U.S. 464 (1977).

39. *See* part II(B) *supra.*

40. After *Wade* and *Bolton,* states were attempting to qualify the right to abortion by imposing certain prerequisites on a woman seeking to terminate her pregnancy. Some of the prerequisites compelled women to obtain a physician's certificate that their fetuses were not viable; some required that their husbands consent to the abortion; and some insisted that if the mothers were unmarried minors, that their parents consent to the procedure. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Supreme Court held that requiring parental or spousal consent would give a second party veto over the woman's constitutionally protected personal right to choose abortion. Therefore, any such state regulation would be unconstitutional according to *Wade* and *Bolton.* However, the Court held that states could require a physician to certify that the fetus was not viable before aborting it. Such a state regulation

there existed a corresponding right to receive Medicaid assistance for the procedure particularly when it was nontherapeutic. Federal district and appellate courts had reached varying conclusions.

Immediately following the *Wade* and *Bolton* decisions, the United States District Court for the District of Utah held that the Utah statutes[41] restricting state Medicaid subsidy to medically necessary abortions were constitutionally invalid.[42] In *Doe v. Rampton,* the Utah district court concluded that a "[s]tate may not so use its Medicaid program to limit abortions" because it would limit the exercise of the right to an abortion by the poor in all trimesters "for reasons having no apparent connection to [the] health of the mother or [the] child."[43] Thus, the Utah court impliedly held that Medicaid funding and the right to choose abortion were inseparable. The limitation on funding of the procedure would exact the same result as the limitation of the right.

In *Roe v. Ferguson,*[44] pregnant welfare recipients[45] challenged an Ohio statute[46] prohibiting the use of state or local funds to pay for abortion unless the medical procedure was necessary to preserve the life or health of the mother. Appellants charged that the statute contravened Title XIX of the Social Security law.[47] The Court of Appeals for the Sixth Circuit held in 1975 that there was no indication that Congress, in Title XIX, intended to fund abortions not required to preserve the health of the pregnant mother.[48]

One year prior to the *Beal* decision, the United States District Court for the District of New Hampshire pronounced its solution to the Medicaid funding issue in *Coe v. Hooker.*[49] In *Coe,* indigent

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would help enforce the state's interest in protecting the potentiality of life. *Id.* at 52.

41. UTAH CODE ANN. §§ 76-7-302(3), 303-11, 313-19 (1953).

42. Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

43. *Id.* at 193.

44. 515 F.2d 279 (6th Cir. 1975).

45. The indigent mothers were joined in this class action by physicians performing abortions for the welfare recipients, clinics where the abortions were performed and the National Organization of Women. *Id.* at 280.

46. OHIO REV. CODE ANN. § 5101.55(c) (Page 1977).

47. 515 F.2d at 280.

48. *Id.* at 283. The Sixth Circuit, using the same language as the Supreme Court did in *Beal,* stated that it was "reluctant" to infer that intent. However, the Sixth Circuit remanded the case to the district court for a full hearing and discussion on whether the state regulations violated the equal protection clause. *Id.* at 283-84.

49. 406 F. Supp. 1072 (D.N.H. 1976).

women[50] sought to terminate their pregnancies in the first trimester. Their abortions were not necessary to preserve their lives or health or that of the fetuses. Plaintiffs were refused Medicaid reimbursement for their abortions[51] even though New Hampshire's regulations provided for "Medicaid benefits for full-term deliveries and other pregnancy related medical care."[52]

The *Coe* court determined that since the New Hampshire statute extended Medicaid assistance to all pregnancy care except elective abortions, it violated Title XIX of the Social Security law.[53] The court gave two reasons for its construction of the Social Security Act.[54] First, Title XIX essentially mandates equal treatment and coverage of the "categorically needy"[55] receiving Medicaid benefits.[56] Second, states are forbidden from arbitrarily denying Medicaid benefits to an eligible individual.[57]

The court squarely held that abortion was an alternate treatment of the medical condition of pregnancy. The court stated that "if New Hampshire offers medical services for the care of pregnancy, it may not unreasonably and arbitrarily restrict a Medicaid patient's choice of treatment."[58] Furthermore, the *Coe* court denounced the state for making a legal decision on moral grounds, stating that "[m]oral judgments are not 'reasonable standards' under the law."[59] By using the equality and arbitrariness tests, the

50. None of the plaintiffs had sufficient means to pay for an abortion, but each was eligible for Medicaid assistance at the time. 406 F. Supp at 1078.

51. *Id.*

52. N.H. REV. STAT. ANN. § 161:4 I (Supp. 1975).

53. 406 F. Supp. at 1084. The court held that by statute Congress had guaranteed Medicaid recipients equal treatment by state Medicaid administrators.

54. *Id.* at 1080.

55. *See* note 2 *supra.*

56. 406 F. Supp. at 1083-84. The court went on to cite 42 U.S.C. § 1396a(a)(10)(B) (1970). "[T]he medical assistance made available to any individuals described in clause (A)(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual. . . ." *Id.*

57. *Id.* 42 U.S.C. § 1396(a)(10)(B)(i) (1970). *See* 45 C.F.R. 249.10(a)(5)(i) (1977).

58. 406 F. Supp. at 1086. The court said that since the state already covered the costs of pregnancy rare for Medicaid recipients, it could not unreasonably exclude abortion as an eligible service under Title XIX. Such exclusion would be an arbitrary denial of Medicaid benefits to eligible individuals.

59. *Id.* at 1083. The district court felt that the New Hampshire Medicaid program was an attempt by the state to impose its own brand of morality on its constituents. According to the district court, the *Wade* and *Bolton* decisions stand for the principle that a state may not infringe upon a woman's right to obtain an abortion simply because the state opposes the procedure on moral grounds.

New Hampshire court struck down the state's Medicaid plan.

Finally, in *McRae v. Mathews*[60] indigent pregnant women petitioned the United States District Court for the Eastern District of New York to enjoin the application of the Hyde amendment[61] on grounds that it was unconstitutional under *Wade* and *Bolton*. The district court stated that the freedom to choose an abortion, although technically unaffected by the act, was an "unreal" right if indigents could not receive Medicaid subsidy for exercising their right.[62] The *McRae* court added that needed medical assistance was denied solely because the woman chose to exercise a constitutionally protected right.[63]

Against this background of lower court decisions, the Supreme Court decided to resolve the Medicaid issue in *Beal v. Doe*.[64] The *Beal* respondents, eligible under Pennsylvania's plan, were denied financial assistance for abortions pursuant to the state regulations. The Pennyslvania Medicaid plan limited assistance to those abortions that were certified by physicians as medically "necessary."[65]

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60. 421 F. Supp. 533 (E.D.N.Y. 1976).

61. *See* notes 22 & 23 and accompanying text *supra*. Although the Hyde amendment to the Health, Education and Welfare (HEW) and Labor Departments' appropriations bill prohibited the use of federal Medicaid funds for nontherapeutic abortions, it does not change the Medicaid statute itself. Congress, acknowledging that *Beal, Maher* and *Poelker* were pending before the Supreme Court, noted in its report that ". . . its action upon this particular appropriations bill [did] not intend to prejudge any constitutional questions involved in those cases." H.R. REP. No. 1555, 94th Cong., 2d Sess. 2 (1976).

On December 7, 1977 the House of Representatives and the Senate renewed the Hyde amendment in a more liberalized form. The new law, again passed as a rider to the yearly appropriations bill for the Departments of Labor and Health, Education and Welfare, allows federal Medicaid funds to subsidize both abortions for physically ill women and certain medical procedures to terminate pregnancy for some incest and rape victims. The compromise is likely to set a pattern for state legislation on the controversial subject, although it appears unlikely that it will satisfy either those opposing abortion or those who support freer access to abortion. Both factions vowed a continued fight when the bill is up for renewal in 1978. Tolchin, *Compromise is Voted by House and Senate in Abortion Dispute,* N.Y. Times, Dec. 8, 1977, § 1, at 1, col. 6.

62. 421 F. Supp. at 542.

63. *Id.*

64. 432 U.S. 438 (1977).

65. 62 PA. CONS. STAT. §§ 441.1-442.1, 3 Penna. Bulletin 2207, 2209, Sept. 29, 1973. The challenged restrictions were regulations of the Pennsylvania Department of Public Welfare. They required that two physicians concur in writing that the abortion is necessary. Furthermore, they provided that abortions were compensable only when:

(1) there is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;

(2) there is documented medical evidence that an infant may be born with incapacitat-

The Court addressed the issue of whether Title XIX required Pennsylvania to fund, under its Medicaid program, the cost of *all* abortions that were permissible under state law. The *Beal* Court held that the state's refusal to extend Medicaid coverage to nontherapeutic abortions was not inconsistent with either the language or the purpose of the Social Security law.[66] Thus the Court indirectly overruled the lower court interpretations in *Rampton, Coe* and *McRae,* and impliedly approved the *Ferguson* holding.

First, the Court emphasized that Title XIX makes no reference to abortion.[67] However, this is not unusual. Title XIX does not single out any particular medical procedure. Instead, it merely outlines general service categories such as physician, inpatient and outpatient services.[68] The Medicaid statute merely requires a state's medical assistance plan to include a "reasonable standard" for determining eligibility and the extent of assistance, and requires that the standard be "consistent with the objectives of this [Title]."[69] Indeed, such language confers broad discretion upon states in their adoption of standards to determine the extent of Medicaid coverage.[70] In applying such a broad test, the Supreme Court rejected the stricter *Coe* interpretation of equality of treatment and arbitrariness of classification.[71]

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ing physical deformity or mental deficiency; or

(3) there is documented medical evidence that a continuance of a pregnancy resulting from legally established stautory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; and

(4) two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

(5) the procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

Id.

66. 432 U.S. at 446-47. The Court asserted that the language of Title XIX, the state purpose involved, and the HEW regulations interpreting the Social Security law all supported its conclusion.

67. *Id.* at 444.

68. *See* note 2 and accompanying text *supra.*

69. 42 U.S.C. § 1396(a)(17) (Supp. V 1975). The Medicaid statute has a dual purpose: to furnish medical assistance to families with dependent children and to those aged, blind, or permanently and totally disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and to help such individuals attain or retain capability for self care.

Furthermore, *Bolton* noted that factors which the physician should consider when determining whether an abortion is necessary include the woman's age, as well as her physical, emotional, psychological and familial well-being. 410 U.S. at 192.

70. 432 U.S. at 444.

71. *See* note 58 and accompanying text *supra.*

Pennsylvania's regulations reflected its policy of encouraging childbirth by subsidizing expenses incident thereto, while refusing to subsidize elective abortion procedures. The *Beal* Court determined that this was a permissible exercise of Pennsylvania's discretion within the parameters of Title XIX.[72] In so holding, the Court recognized the state's valid and important interest in promoting childbirth.[73] Although that interest cannot justify state interference with a woman's constitutionally protected choice to obtain an abortion, the Court said that the state's interest is sufficient to regulate Medicaid payment throughout the course of a woman's pregnancy.[74] Furthermore, the Court stated that it would not presume that Congress intended to condition a state's participation in the Medicaid program on its willingness to forego this state interest.[75]

Responding to the charge that Pennsylvania's statute discriminated against the poor, the Court explained that Pennsylvania did not obstruct the pregnant woman's path to abortion. Rather, the medical profession created the money hurdle by requiring payment for its services.[76] A woman still possesses the fundamental right to obtain an abortion.[77]

The encouragement of childbirth and a moral opposition to abortion may indeed be two sides of the same coin. A state could camouflage a moral opposition to abortion in its Medicaid statute by claiming that it is merely exercising its recognized interest in encouraging childbirth. Perhaps the Supreme Court is saying that a state may base its decision on whether to subsidize elective abortions purely on moral grounds, thus departing from the holdings in the *Wade, Bolton* and *Coe* cases.[78] Furthermore, the theoretical right to choose whether to obtain an abortion may, in practice, never reach fruition if an indigent mother desiring such a procedure cannot pay for it.

72. 432 U.S. at 444.
73. *Id.* at 445-46.
74. *Id.* at 446.
75. *Id.* at 446-47.
76. *See* note 102 and accompanying text *infra.*
77. 432 U.S. at 446.
78. *See* note 59 and accompanying text *supra.*

IV. Application of the Equal Protection Clause to State Medicaid Plans (*Maher v. Roe*[79])

Having rejected the statutory claim,[80] the Court was obligated to reach the constitutional issue that restricting Medicaid assistance for nontherapeutic abortions constituted a denial of equal protection. In *Bolton,* the Supreme Court had side-stepped petitioner's argument that the Georgia statute discriminated against the poor and thus violated equal protection of laws.[81] Following the *Bolton* decision, it was in doubt whether states which subsidized childbirth expenses through their Medicaid plans were now required by the fourteenth amendment to subsidize nontherapeutic abortions.

One year after *Bolton,* indigent pregnant women challenged a policy established by the executive director of the Utah Department of Social Services[82] that only therapeutic abortions[83] would be subsidized through the state's Medicaid program. In *Doe v. Rose,*[84] the Court of Appeals for the Tenth Circuit found that such restriction unduly limited the exercise of the right to an abortion in all trimesters, for reasons having no apparent connection to the health of the mother or child.[85]

Utah's directive failed to meet either the compelling interest or rational basis tests.[86] The court concluded that the policy invidiously discriminated against indigent abortion candidates by effectively limiting abortions on moral grounds.[87] Moreover, *Rose* held that the Utah restriction denied an indigent medical assistance un-

79. 432 U.S. 464 (1977).

80. Since the statute is sufficiently vague in construction, the statutory argument easily could have been decided either for or against the respondents in *Beal.* However, the Court's interpretation of the statute necessarily leads to a complete discussion of the equal protection argument in *Maher v. Roe.*

81. *See* note 38 *supra.*

82. The Court of Appeals for the Tenth Circuit in *Rose* said that although the policy was not reduced to writing, it was followed by the Utah State Department of Social Services. 499 F.2d 1112, 1113 (10th Cir. 1974).

83. "Therapeutic abortions" were defined as those necessary to save the life of the mother or to prevent serious or permanent impairment of her physical health. *Id.* at 1117.

84. 499 F.2d 1112 (10th Cir. 1974).

85. *Id.* at 1115 (emphasis added). The court would not allow this limitation on such a surgical procedure once a state has already undertaken to provide general short-term hospital care funding similar procedures. *Id.*

86. *Id.* The Tenth Circuit stated that since the costs of childbirth were far greater than abortion expenses, the policy could not pass the rational basis test. *See* note 29 *supra.*

87. 499 F.2d at 1117.

less she relinquished her freedom of choice and bore the child.[88] The court noted that the policy discriminated against the indigent mother by reason of her poverty and by reason of her behavioral choice. Conditioning the receipt of statutory entitlement upon forfeiture of fundamental constitutional rights (commonly called the "unconstitutional conditions doctrine") was, according to the court, prohibited by due process of law.[89]

In the same year as the *Rose* decision, the Court of Appeals for the Seventh Circuit faced a similar equal protection claim in *Friendship Medical Center, Ltd. v. Chicago Board of Health.*[90] The medical center challenged Illinois regulations requiring that detailed records be kept concerning abortions and their recipients. The Seventh Circuit voided the regulations, holding that the fundamental right to an abortion requires that the right be free of all governmental regulations that have an effect on the abortion decision, at least during the first trimester.[91]

Having decided the statutory claim in *Beal,* the Supreme Court attempted to put to rest the controversy over the equal protection issue. In *Maher v. Roe,*[92] two indigent women who were unable to obtain a physician's certificate of medical necessity, brought an action attacking the validity of a Connecticut Welfare Department regulation[93] which limited state Medicaid assistance for first trimes-

88. *Id.*

89. This theory was established in Sherbert v. Verner, 374 U.S. 398 (1963), wherein the Supreme Court invalidated a state's refusal to provide unemployment benefits to a woman whose religious beliefs forbade her to work on Saturday. The Court held that conditioning receipt of unemployment compensation on the beneficiary's agreement to work on Saturday would require her to forfeit her first amendment right to free exercise of religion and was thus unconstitutional. The "unconstitutional conditions doctrine" is usually couched in equal protection terms, as in Memorial Hosp. v. Maricopa County, 415 U..S. 250 (1974), where the Supreme Court struck down an Arizona regulation conditioning medical benefits to the indigent on a lengthy residency period. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967), Perry v. Sindermann, 408 U.S. 593 (1972). *See also* Comment, *Another Look at Unconstitutional Conditions,* 117 U. Pa. L. Rev. 144 (1968).

90. 505 F.2d 1141 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975).

91. *Id.* at 1151. The Seventh Circuit concluded that only general health regulations that would not be burdensome on a woman's right to decide to abort a pregnancy would be constitutional. *Id.* at 1154.

92. 432 U.S. 464 (1977).

93. Connecticut Welfare Dept. Public Assistance Program Manual, Vol. 3, c. III, § 275. Section 275 provides in relevant part:

"The [Welfare] Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:

ter abortions to those that were "medically necessary." Appellees contended that the equal protection clause of the fourteenth amendment requires states to subsidize nontherapeutic abortions through their Medicaid programs for women eligible for Medicaid.[94]

The United States District Court for the District of Connecticut had held[95] that the equal protection clause forbids the exclusion of elective abortions from a state welfare program that generally subsidizes medical expenses incident to pregnancy and childbirth.[96] Furthermore, the court found that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternate medical methods of dealing with pregnancy . . . ."[97]

The Supreme Court reversed the three judge district court,[98] hold-

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(1) In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.

(2) The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy . . . .

(3) The written request for the abortion is submitted by the patient, and in the case of a minor, by the parent or guardian.

(4) Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

Id. See 432 U.S. at 466 n.2.

94. 432 U.S. at 466.

95. Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975) (three-judge court), *rev'd sub nom.* Maher v. Roe, 432 U.S. 464 (1977).

96. Connecticut originally defended its regulation on the theory that Title XIX of the Social Securities Act prohibited the funding of abortions that were not medically necessary. The district court in Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), held that the Social Security Act not only allowed state funding of elective abortions but required it. On appeal, the Court of Appeals for the Second Circuit held that Title XIX allowed but did not mandate the funding of nontherapeutic abortions. Roe v. Norton, 522 F.2d 928 (2d Cir. 1975). The case was then remanded to a three-judge district court.

97. 408 F. Supp. 660, 663 n.3 (D. Conn. 1975), *citing* Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179 (1973). Relying on Shapiro v. Thompson, 394 U.S. 618 (1969) and Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974), the district court held that the Connecticut regulation dissuaded the pregnant mother from exercising her "constitutionally protected right" to a nontherapeutic abortion, thus infringing upon a fundamental right. 408 F. Supp. at 663-64.

98. 432 U.S. at 464. As with all other equal protection claims the crucial question was the applicable test. If the Court found the presence of a suspect classification or fundamental constitutional right, a "compelling interest" test would apply. This would mean almost certain victory for the plaintiffs since the state would be able to impose its restrictions on abortion only if it could prove it had a compelling state interest in doing so. However, if the Court found neither of those factors it could apply a "rational basis" test. This would spell almost certain doom for plaintiff's claims.

For a more complete discussion on the equal protection clause of the fourteenth amendment

ing that the case neither involved discrimination against a suspect class nor impinged upon a fundamental right.[99] The Court stated that financial need alone does not identify a suspect class for purposes of an equal protection analysis.[100] A suspect classification based on wealth arises when an indigent is totally deprived of a *state furnished* commodity because of his inability to pay a *state-imposed* fee.[101] The Court noted that, in the instant case, private physicians, requiring fees for their abortion services, rather than the state, imposed the money hurdle.[102]

The *Maher* Court also held that the indigent appellees had a

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and the applicable tests, see Tussman & ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949); *see generally* Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 Fordham L. Rev. 605 (1973). *See also San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) ("We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny . . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therfore does not constitute an invidious discrimination . . . ." *Id.*, *cited in* 432 U.S. at 470).

99. *Id.*

100. *Id.* at 470-71.

101. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. at 20-22. For cases where the courts have found a suspect classification based on wealth because of an indigent's inability to pay a state imposed monetary hurdle, see Griffin v. Illinois, 351 U.S. 12 (1956); Burns v. Ohio, 360 U.S. 252 (1959); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Anders v. California, 386 U.S. 738 (1967); Boddie v. Connecticut, 401 U.S. 371 (1971). In United States v. Kras, 409 U.S. 434 (1973), the Court refused to extend the *Boddie* rule to a bankruptcy filing fee.

It might be argued that the rule delineated in *Boddie v. Connecticut, supra*, would govern if the state monopolized the means of obtaining an abortion. However, imposing on states the absolute responsibility to pay a physician to perform an abortion is substantially different from requiring states to waive fees they would otherwise collect as was done in *Boddie*. It would create an affirmative duty to pay a third party to provide a service. Extending this logic to its extreme, states would be required to pay for all medical care for all residents because some can afford to purchase it from state-licensed providers. Such would establish a judicial national health insurance law. The courts have not gone this far.

102. 432 U.S. at 474. *See* note 76 and accompanying text *supra*. In so emphasizing, the Court has retreated from its previous statement in Singleton v. Wulff, 428 U.S. 106 (1976), that "[f]or a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary." 428 U.S. 118-19 n.7. In *Singleton*, two Missouri-licensed physicians brought an action for injunctive and declaratory relief from a Missouri statute, Mo. REV. STAT. § 208.151-208.158 (Supp. 1976), excluding abortions that were not "medically indicated." It must be noted, however, that in *Singleton*, the Supreme Court did not pass on the constitutionality of the Missouri statute. Rather, the Court ruled only that the physicians had standing to challenge the state regulation and remanded the constitutional question to a lower court.

fundamental right only to an abortion and not to reimbursement for the medical expenses incurred in connection therewith.[103] Thus, the Court stated that the Connecticut regulation placed no obstacles in the pregnant woman's path to an abortion.[104] Having created no obstacles, the regulation did not impinge upon the fundamental right recognized in *Wade* and *Bolton.*

The Court analyzed the decision whether or not to have an abortion as if it were made in a vacuum.[105] Certainly, a crucial factor in making that decision is whether the indigent woman will receive Medicaid reimbursement. A state policy which withholds payment not only influences the decision, but in many cases determines it. Since payment is not a fundamental right, according to the Court, the state may withhold the necessary funds. Thus, the present law seems to be that a woman has a fundamental right to have an abortion without state interference; but such a right in the absence of a state subsidy, is all but meaningless.

The Court cited *Meyer v. Nebraska*[106] and *Pierce v. Society of Sisters*[107] as authority for establishing a difference between direct state interference with a protected activity and state encouragement of an alternate activity.[108] In *Meyer,* the Court held that the state had the power to prescribe a curriculum which included English and excluded German from its public schools.[109] Similarly, according to the *Maher* Court, ". . . *Pierce* casts no shadow over a State's power to favor public education by funding it" and not subsidizing private and parochial education.[110] *Meyer* and *Pierce* represent *state encouragement* of an alternate activity which according to the *Maher* Court is perfectly reasonable.[111] Thus, the *Maher*

103. 432 U.S. at 473-74.

104. *Id. See* note 102 and accompanying text *supra.*

105. *Id.* at 474. In fact, the Court realized that by not funding elective abortions a state does indeed influence the mother's decision. But as long as the state does not create an obstacle in the path of making that decision, such regulations, according to the Supreme Court, do not infringe upon the fundamental right. The Supreme Court stated that "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth. . . ." *Id.*

106. 262 U.S. 390 (1923).

107. 268 U.S. 510 (1925).

108. 432 U.S. at 476-77.

109. 262 U.S. at 402-03.

110. 432 U.S. at 476-77.

111. *Id.* at 476. On the other hand, the Supreme Court also cited Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); and Shapiro v. Thompson, 394 U.S. 618 (1969), as

Court held that a state does not have to show a compelling interest to support its policy favoring childbirth any more than a state must justify its decision to fund public but not private schools.[112]

The Court in *Maher* held Connecticut to the much less rigorous rational basis test.[113] That test requires only that the state rationally justify the distinction between childbirth and elective abortions.[114] The Supreme Court, in many abortion decisions, has discussed the depletion of the public fisc[115] and the health of the mother in deciding whether disparate treatment met the rational basis test.[116] But, expenses incident to childbirth, which would be reimbursable under Medicaid, far exceed the cost of an abortion.[117] The Court has also pointed out that carrying the pregnancy to a properly executed delivery is far more detrimental to the mother's health than a properly executed abortion performed during the first trimester of pregnancy.[118] Thus, there is clearly some doubt about whether these considerations would be sufficiently persuasive to satisfy the rational basis test.

In fact, the Court in *Maher* cited other reasons to justify the disparate treatment. It held that Connecticut had a "strong and legitimate interest in encouraging normal childbirth" and that the Connecticut regulation furthered that goal.[119] It concluded that subsidizing the costs incident to childbirth was a rational means of

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cases in which states have overstepped their bounds by interfering with a *protected right*—the right to travel. In *Memorial Hospital*, the Court struck down a residency requirement established by the hospital for all non-emergency services. 415 U.S. at 269. In *Shapiro*, the Court held as unconstitutional a state residency requirement needed to collect welfare funds. 394 U.S. at 462.

112. 432 U.S. at 477.

113. *Id.* at 478. *See* note 29 *supra.*

114. *See* Lindsey v. Normet, 405 U.S. 56 (1972) for an example of the application of the rational basis test.

115. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 549 (1972). A state may refuse to offer a service for this reason.

116. However, in the instant case, both factors were favorable to the appellees' challenge. Therefore, had the Supreme Court applied the usual tests for determining whether the state had met the rational basis test, the result might have been different.

117. The New York Times reported the latest HEW estimate for 1977 that maternity costs for welfare mother, plus pediatric fees for her baby's first year, plus public assistance funds from federal, state and local governments add up to $2,200, whereas the average abortion costs are between $150-200. Dullea, *Supreme Court Ruling Sparks Moves to Halt Medicaid Abortions,* N.Y. Times, June 27, 1977, § 3 (Family/Style), at 32.

118. *See* Beal v. Doe, 432 U.S. at 445.

119. 432 U.S. at 478, *citing* Beal v. Doe, 432 U.S. at 446.

encouraging childbirth.[120]

Finally, the Court emphasized that Congress can legislate to provide Medicaid benefits for such abortions if it wishes.[121] *Maher* also reiterated that states are free to choose whether to fund elective abortions through their own Medicaid programs.[122] Thus, the Supreme Court impliedly overruled both *Rose* and *Friendship Medical Center.*[123]

V. Restricting Providers of Medicaid Abortions (*Poelker v. Doe*[124])

Medicaid is a vendor payment program designed to reimburse providers of health care for services rendered to program beneficiaries.[125] It will pay for services if the proposed recipient can locate someone who will provide the desired treatment. Because of increasingly burdensome administrative procedures for obtaining payment and because of past and present disparities between fees paid by Medicaid and those paid by private patients, many providers refuse to treat Medicaid patients.[126]

In *Poelker v. Doe,*[127] the Supreme Court allowed city officials to

120. *Id.* at 479.

121. *Id.* at 480.

122. *Id.*

123. Having decided *Maher,* the Court acted quickly to reverse the grandfather of Medicaid abortion cases, Klein v. Nassau County Medical Center, *vacated sub nom.* Toia v. Klein, 97 S. Ct. 2962 (1977), and remanded to the district court for further considerations in light of *Beal* and *Maher.* In *Klein,* a New York law forbidding Medicaid reimbursement for elective abortions was twice successfully challenged. N.Y. Soc. Serv. Law § 365a(2) (McKinney 1976) and administrative letters 71PWP-17 and 72PWP-27 issued by the New York State Commissioner of Social Services dated April 8, 1971. *See* 347 F. Supp. 496, 497-98 (E.D.N.Y. 1972). The United States District Court for the Eastern District of New York, in 1972 and again in 1976, had held that a statute or rule attempting to deny or interfere with a woman's choice of whether to bear a child infringes upon her fundamental right to an abortion. 347 F. Supp. at 500-01 (E.D.N.Y. 1972); 409 F. Supp. 731, 734 (E.D.N.Y. 1976). Moreover, the district court had found that it was a denial of equal protection to prohibit Medicaid assistance for legal abortions to indigent women who otherwise qualify for Medicaid. 409 F. Supp. at 733. Facing facts similar to those in the instant cases, the Supreme Court vacated *Klein* and remanded that case to the district court for further consideration in light of its decisions in *Beal* and *Maher.* Klein v. Nassau County Med. Center, *vacated sub nom.* Toia v. Klein, 97 S. Ct. 2962 (1977).

124. 432 U.S. 519 (1977).

125. 42 U.S.C. § 1396d(a) (Supp. V 1975).

126. *See* Butler, *The Medicaid Program: Current Statutory Requirements and Judicial Interpretations,* 8 Clearinghouse Rev. 7, 14-15 (1974).

127. 432 U.S. 519 (1977).

remove city financed hospitals from the provider market. The *Poelker* decision overturned two prior circuit court decisions. In *Nyberg v. City of Virginia,*[128] physicians and indigent pregnant women challenged the constitutionality of a municipal hospital resolution which prohibited use of hospital facilities for nontherapeutic abortions.[129] The Court of Appeals for the Eighth Circuit required that the hospital take cognizance of separate trimesters in its regulation of abortion. Since the hospital resolution did not do so, it was held to be overbroad and invalid.[130] Furthermore, the court stated "[i]t would be a nonsequitur to say that the abortion decision . . . [is] to be made by the physician and his patient without interference by the state and then to allow the state . . . to effectively bar the physician from using state facilities to perform the operation."[131] The court concluded that the hospital's administration could not "arbitrarily preclude abortions from the variety of services offered which require no greater expenditure of available facilities and skills."[132]

In *Doe v. Hale Hospital,*[133] the Court of Appeals for the First Circuit approved of the *Nyberg* result by holding that a public medical facility may not forbid elective abortions so long as it offers medically indistinguishable procedures.[134] The *Hale* court held that it is not necessary to proscribe abortion in order to contravene the *Wade* and *Bolton* decisions. It is sufficient to create barriers which "unduly restrict" the rights of women.[135]

In *Poelker,* the last of the abortion trilogy, the Supreme Court took the *Beal-Maher* rationale one step further. Doe, a pregnant mother of two, challenged a policy directive issued by the Mayor of St. Louis, Missouri which prevented her from obtaining an abor-

128. 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed,* 419 U.S. 891 (1974).

129. Resolution No. 2606, Feb. 5, 1973, Virginia Municipal Hospital, Minnesota. *See* 495 F.2d at 1343.

130. 495 F.2d at 1345-46.

131. *Id.* at 1346.

132. *Id.* The court stated that its decision would not require a hospital to establish new or different facilities and staff in order to perform the operation. *Id.* at 1345.

133. 500 F.2d 144 (1st Cir. 1974).

134. *Id.* at 147. The court added that this would violate the fundamental right associated with the decision to terminate pregnancy. The First Circuit said that it was indisputed fact that the hospital already permitted use of its facilities for medical procedures in the same general area of medical practice as abortions, exposing the patient to greater risk in some instances and imposing a greater demand upon the hospital's resources. *Id.*

135. *Id.* at 146, *citing Bolton,* 410 U.S. at 198.

tion.[136] The directive, a memorandum from the Mayor to the Director of Health and Hospitals, prohibited the use of city hospital facilities for performing abortions unless the pregnancy threatened grave physiological injury or death to the mother.[137]

The Court held, in light of *Maher*, that the St. Louis policy providing publicly financed hospital services for childbirth, while not financing services for elective abortions, did not violate the fourteenth amendment.[138] The Supreme Court explained that the Mayor's policy of denying city funds for abortions should be approved or disapproved of at the polls.[139]

Poelker permits cities to close their hospital doors to abortions for rich and poor alike,[140] thus impliedy overruling both the *Nyberg*[141] and *Hale Hospital* decisions. Therefore, an additional obstacle is now placed in the woman's path to abortion—that of searching for a private hospital or clinic.[142]

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136. 432 U.S. at 519. Doe had had five prior miscarriages and was presently suffering from cervical fibroid tumors and polyps and an extremely retroverted uterus. 515 F.2d 541, 542-43 (8th Cir. 1977). However, she could not obtain a doctor's certification justifying that an abortion would save her from grave physiological injury or death. Thus, she was forbidden to obtain an abortion from the local city-owned and operated Max C. Starkloff Hospital. *Id.*

The hospital's medical employees were staffed exclusively from the affiliated medical school of St. Louis University, a Jesuit institution. The mayor's directive disallowed all elective abortions from being performed at the hospital unless the abortions were necessary to save women from "grave physiological injury or death." *Id.* at 543. Furthermore, if Doe had sought to obtain her abortion from a private clinic, the city would have denied medical assistance through its Medicaid plan unless she met those requirements. However, the city offered Medicaid subsidies to all indigent mothers who chose to bear their children. *Id.* at 545.

The Court of Appeals for the Eighth Circuit required that all city-owned facilities be made available for such abortions and held that the city had a "duty" to obtain services of responsible physicians whose views on abortion did not prohibit them from performing such a procedure. *Id.* at 546. The Supreme Court reversed. 432 U.S. at 520-21.

137. 432 U.S. at 520. It is noteworthy that the mayoral directive was promulgated by Mayor John H. Poelker several months after the Supreme Court abortion decisions of *Wade* and *Bolton* were announced on January 22, 1973. 515 F.2d at 543 n.3.

138. 432 U.S. at 521.

139. *Id.*

140. *Id.* at 522-23 (Brennan, J., dissenting).

141. In 1974, the Supreme Court refused to hear an appeal from the *Nyberg* decision. 419 U.S. 891 (1974). The decision in *Poelker*, which effectively overruled *Nyberg*, indicates a change of heart on the part of the Supreme Court.

142. A recent survey suggests that the effects of the decision in this case will be felt most strongly in the rural areas, where the public hospital will in all likelihood be closed to elective abortions, and where there will not be sufficient demand to support a separate abortion clinic. Sullivan, Tietze and Dryfoos, *Legal Abortion in the United States (1975-1976)*, 9 Family Planning Prospectives 116, 121 (1977).

Less than three months after the Supreme Court decided *Poelker*, the United States District Court for the Eastern District of Wisconsin in *Doe v. Mundy*[143] extended the Supreme Court rationale to include medically necessary or therapeutic abortions. In *Mundy*, plaintiffs sought an injunction and declaratory relief against the policy of Milwaukee County General Hospital (MCGH) precluding the hospital from performing abortions unless the continuation of the mother's pregnancy threatened her life.[144]

Plaintiffs argued that the requirement was so restrictive as to deny abortions which by Supreme Court standards would be termed medically necessary.[145] The district court held that the Supreme Court in its abortion trilogy had not "restricted its decisions to the upholding of regulations allowing abortion based on medical necessity."[146] In fact, the court squarely stated that "*Beal, Maher,* and *Poelker* declared no constitutional violation in the failure to provide funding for medically necessary abortions . . . . [Therefore,] the county may choose to fund the medical aspects of childbirth and decline to fund the performance of any abortion which is not required because of a threat to a woman's life imposed by continuation of her pregnancy."[147]

The Wisconsin court in *Mundy* utterly disregarded the Supreme Court's finding in *Beal* that "[a]lthough serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent

143. 441 F. Supp. 447 (E.D. Wis. 1977).

144. 441 F. Supp. at 448-49. MCGH's rule 26(b) provides in pertinent part that "[p]regnancy may be terminated therapeutically if it is complicated by medical conditions of such nature and advanced to such degree that continuation of pregnancy threatens the life of the mother." MCGH redefined the terms "elective" and "therapeutic." The hospital's rules stated that elective abortions referred "to any abortion proscribed under rule 26(b)" while therapeutic abortion is one permitted under the rule. JPMS, p.2, ¶¶ 1 and 2, 441 F. Supp. at 449.

145. In *Beal*, an abortion was defined by regulation as medically necessary when pregnancy could threaten a woman's health, when it resulted from rape or incest and would constitute a threat to a woman's mental or physical health and when an infant would possibly be born with a mental deficiency or physical deformity. 432 U.S. at 441 n.3. In *Maher*, the regulation provided a subsidy for medically necessary abortions which included psychiatrically necessary abortions. 432 U.S. at 466 n.2. In *Poelker*, the mayoral directive prohibited the performance of abortions in city hospitals except when there was a threat of physiological injury or death to the mother. 432 U.S. at 520. In *Mundy*, the MCGH rule only allowed abortion if continued pregnancy threatened the mother's life. 441 F. Supp. at 447.

146. 441 F. Supp. at 451.

147. *Id.* at 452.

with the objectives of the [Social Security] Act for a State to refuse to fund *unnecessary*—though perhaps desirable—medical services."[148]

This strong dictum suggests that the *Mundy* decision should be overruled. Having decided the fate of nontherapeutic abortions, the Supreme Court might very well have to decide whether states may now refuse to subsidize any medically necessary abortions other than those required to preserve the mother's life.

VI. Conclusion

In *Wade* and *Bolton* the Supreme Court clearly said that states may not infringe upon a woman's right to obtain an abortion simply because the state opposes the procedure on moral grounds. In *Wade*, the Court held that prior to the end of the first trimester, the abortion decision *and its effectuation* must be left to the pregnant mother in consultation with her attending physician.[149] The *Wade* Court stated that although the state has a legitimate interest in protecting both the pregnant woman's health and the potentiality of human life, those interests reach a "compelling point" during the last two trimesters of the woman's pregnancy.[150] Until those interests reach that "compelling point," the state cannot override the abortion decision *or its effectuation.*

Four years later, the Supreme Court has effectively undercut its prior decisions by declaring that a state may limit funding for elective abortions. Limiting Medicaid reimbursement for nontherapeutic abortions may pose an insurmountable obstacle to the indigent woman's ability to effectuate her abortion decision.

In *Maher,* the Court stated that obtaining an abortion was effectively a two-stage process. In the first stage, a woman, without considering her financial situation, decides to terminate her pregnancy. In the second stage, she determines how to pay for it. The Supreme Court has held that the state is only prohibited from interfering with stage one. Stage two can be regulated by the states.

Such reasoning is questionable at best. Given the soaring costs of medical care, many decisions to seek abortions will be contingent upon reimbursement. The Medicaid funding issue is inextricably

148. 432 U.S. at 444-45.
149. 410 U.S. at 163 (emphasis added).
150. *Id. See* notes 29-33 *supra.*

bound to the right to exercise a choice to obtain an abortion. Limiting the funding effects the same result as limiting the actual right, at least insofar as indigent women are concerned. It is unrealistic to believe that an indigent woman can make a valid choice if she knows she will be deprived of the means to effectuate her choice. However, if she chooses to follow the state-encouraged morality and bear her children, she will be reimbursed not only for her predelivery and delivery expenses but also for her children's post-natal costs and will later receive an increase in her welfare stipend.

To be consistent with equal protection, a state's separate classification of abortion candidates in a state's Medicaid plan has to rest upon some rational basis.[151] Having held that the abortion decision is a two-stage process, the Court then said that states have a valid interest in encouraging childbirth throughout the entire term of the pregnancy, thus satisfying the rational basis test.[152] The state interest was applied to limit the second stage or the financing stage of the abortion decision process.[153] Thus, the Court cautiously avoided overruling *Wade* and *Bolton.*[154] According to the Supreme Court, states may validly encourage childbirth by denying Medicaid funding for abortions, but states may not proscribe the theoretical right to an abortion. Arguably, the state policy of encouraging childbirth and the state opposition to abortion on moral grounds are opposite sides of the same coin. In effect, the Supreme Court may now allow public morality to curtail the effectuation of the abortion right.

The *Poelker* decision, even more dramatically than *Beal* and *Maher,* curtails the *Wade* and *Bolton* holdings since it not only refuses to honor the differing rights arising out of each trimester of pregnancy as laid out in *Wade* and *Bolton,* but it closes off one more channel to abortion—public hospitals—for the rich and poor alike.

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151. *See* note 29 *supra.*

152. The usual criteria employed in a rational basis analysis in abortion cases is preserving the public fisc and the health of the mother. However, it has been clearly established that expenses incident to childbirth are much higher than those incident to abortion. *See* note 117 *supra.* Also, there is less danger in obtaining a proper medical abortion early in one's pregnancy than in carrying the pregnancy to term. *See* note 118 and accompanying text *supra.* Therefore, had the Court used only these criteria, the results would have supported the conclusion that states have no rational basis for not funding nontherapeutic abortions.

153. The state interest, according to *Wade,* could not interfere with a woman's right to seek an abortion. However, the Supreme Court in the abortion trilogy segregated the theoretical right to choose abortion from the practical decision of how to pay for one.

154. *See* notes 149 & 150 and accompanying text *supra.*

In many rural areas, public hospitals are the only hospitals in the near vicinity.[155] Moreover, privately owned hospitals may refuse to treat Medicaid patients for abortions for a variety of reasons, including religion, red tape and lower fee schedules.[156] Thus, private institutions are not the ideal substitute for publicly financed hospitals. In short, the abortion trilogy allows cities and states to achieve indirectly what they are prohibited from achieving directly—the proscription of nontherapeutic abortions.[157]

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155. Poelker v. Doe, 432 U.S. at 524 (Brennan, J., dissenting).

156. *See* note 126 and accompanying text *supra*.

157. The Court held that states may, if they wish, extend medical coverage for elective abortions. 432 U.S. at 447. However, it is questionable whether states will enact such legislation, since, pursuant to Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), and Shapiro v. Thompson, 394 U.S. 618 (1969), states desiring to extend Medicaid assistance for elective abortions could not condition the medical benefits on a residency period. Therefore, any state funding nontherapeutic abortions would be faced with indigent residents from neighboring states, which had not extended Medicaid coverage, drawing abortion funds from its treasury.